

**SENATE SUBSTITUTE AMENDMENT 3,
TO 2005 SENATE BILL 448**

February 15, 2006 – Offered by Senator OLSEN.

- 1 **AN ACT** *to create* 101.148 and 895.07 of the statutes; **relating to:** contractor
2 notices, claims against certain contractors and suppliers of dwellings, and
3 providing a penalty.

Analysis by the Legislative Reference Bureau

This substitute amendment requires contractors that contract to construct or remodel a person's residence to deliver to the person a brochure explaining the procedures created in this substitute amendment and that he or she must follow those procedures before suing a contractor or window or door supplier. Under the substitute amendment, if the dwelling owner, which may be a condominium association, is concerned about a possible construction defect, the owner must give a written notice of claim to the contractor at least 90 working days before starting a court action against the contractor. The substitute amendment requires the written notice to detail the nature of the alleged construction defect, including any evidence that the owner of the dwelling has that substantiates the nature and cause of the defect.

After the contractor receives the notice, the substitute amendment gives the contractor time to respond to the notice with a written offer to inspect the property, make repairs, settle the claim with a monetary payment, or reject the claim. Under the substitute amendment, if the claim is rejected at this point, or if the contractor fails to respond timely to the claim, the owner can start a court action against the

contractor. If the contractor makes a settlement offer and the owner rejects the offer, the owner must do so with a written statement that includes the reasons for the rejection. The substitute amendment requires the owner to allow the contractor reasonable access to the dwelling if the contractor wants to inspect the alleged construction defect. After inspection, the substitute amendment allows the contractor to submit a settlement offer or reject the claim. If the owner rejects an offer, the substitute amendment allows the contractor to submit a timely supplemental offer and requires the owner to respond to the supplemental offer under the same procedures as for the original offer.

If the property is inspected and requires some destructive testing, the substitute amendment requires the contractor to return the dwelling to its condition before the inspection. If the owner of a dwelling agrees to a contractor's settlement offer and the contractor does not follow through as agreed, the substitute amendment allows the owner to file in the court action the offer and acceptance as rebuttable evidence of an agreement.

The substitute amendment allows an owner to repair a construction defect immediately without giving notice if the repair is necessary for health or safety.

If the dwelling owner begins a court action but fails to follow the procedures, and the contractor has provided the owner with the proper notice and brochure, under the substitute amendment the court must dismiss the action without prejudice. If the dwelling owner begins a court action but fails to follow the procedures, and the contractor does not provide the owner with the proper notice and brochure, under the substitute amendment the court stays the action and orders the parties to comply with the substitute amendment's provisions.

Under the substitute amendment, a contractor may obtain contribution from a window or door supplier for the cost of repairing the construction defect if the contractor follows procedures in the substitute amendment similar to those that apply to the contractor and owner regarding a defect, including notifying the supplier of the alleged defect and giving the supplier an opportunity to remedy the defect or to make an offer of settlement.

The substitute amendment requires the Department of Commerce to prepare a draft of a brochure that explains the process in this substitute amendment and to provide that draft to contractors. Contractors are required to give a copy of the brochure to the person whom the contractor contracts with to construct or remodel a dwelling.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

- 1 **SECTION 1.** 101.148 of the statutes is created to read:
- 2 **101.148 Contractor notices. (1) DEFINITIONS.** In this section:

1 (a) “Consumer” means a person who enters into a written or oral contract with
2 a contractor to construct or remodel a dwelling.

3 (b) “Contractor” means a person who enters into a written or oral contract with
4 a consumer to construct or remodel a dwelling.

5 (c) “Deliver” means any of the following:

6 1. Depositing the document or written notice in the U.S. mail or with a
7 commercial delivery service, addressed to the applicable person.

8 2. Giving the document or written notice personally to the applicable person.

9 (d) “Dwelling” means any premises or portion of a premises that is used as a
10 home or a place of residence and that part of the lot or site on which the dwelling is
11 situated that is devoted to residential use. “Dwelling” includes other existing
12 structures on the immediate residential premises such as driveways, sidewalks,
13 swimming pools, terraces, patios, fences, porches, garages, and basements.

14 (e) “Remodel” means to alter or reconstruct a dwelling. “Remodel” does not
15 include maintenance or repair work.

16 **(2) NOTICE REQUIRED AT TIME OF CONTRACTING.** (a) Before entering into a written
17 contract to construct or remodel a dwelling, or, if the parties enter into an oral
18 contract, as soon as reasonably possible, but before commencing any work to
19 construct or remodel a dwelling, the contractor shall deliver to the consumer a copy
20 of the brochure prepared under s. 895.07 (13) and a notice worded substantially as
21 follows:

22 NOTICE CONCERNING CONSTRUCTION

23 DEFECTS

24 Wisconsin law contains important requirements you must follow before you
25 may file a lawsuit for defective construction against the contractor who constructed

1 your dwelling or completed your remodeling project or against a window or door
2 supplier or manufacturer. Section 895.07 (2) and (3) of the Wisconsin statutes
3 requires you to deliver to the contractor a written notice of any construction
4 conditions you allege are defective before you file your lawsuit, and you must provide
5 your contractor or window or door supplier the opportunity to make an offer to repair
6 or remedy the alleged construction defects. You are not obligated to accept any offer
7 made by the contractor or window or door supplier. All parties are bound by
8 applicable warranty provisions.

9 (b) The notice required under par. (a) shall be conspicuous and in writing and
10 may be included within the contract between the contractor and the consumer.

11 **SECTION 2.** 895.07 of the statutes is created to read:

12 **895.07 Claims against contractors and suppliers. (1) DEFINITIONS.** In this
13 section:

14 (a) “Action” means a civil action or an arbitration under ch. 788.

15 (b) “Association” means a homeowner’s association, condominium association
16 under s. 703.02 (1m), unit owner’s association, or a nonprofit corporation created to
17 own and operate portions of a planned community that may assess unit owners for
18 the costs incurred in the performance of the association’s obligations.

19 (c) “Claim” means a request or demand to remedy a construction defect caused
20 by a contractor or supplier related to the construction or remodeling of a dwelling.

21 (d) “Claimant” means the owner, tenant, or lessee of a dwelling, or an
22 association, who has standing to sue a contractor or supplier regarding a
23 construction defect.

24 (e) “Construction defect,” in those cases when the contractor or supplier has
25 provided a warranty to a consumer, means the definition of “defect” in the warranty.

1 In all other cases, “construction defect” means a deficiency in the construction or
2 remodeling of a dwelling that results from any of the following:

3 1. Defective material.

4 2. Violation of applicable codes.

5 3. Failure to follow accepted trade standards for workmanlike construction.

6 (f) “Consumer” means a person who enters into a written or oral contract with
7 a contractor to construct or remodel a dwelling.

8 (g) “Contractor” means a person that enters into a written or oral contract with
9 a consumer to construct or remodel a dwelling.

10 (h) “Dwelling” means any premises or portion of a premises that is used as a
11 home or a place of residence and that part of the lot or site on which the dwelling is
12 situated that is devoted to residential use. “Dwelling” includes other existing
13 structures on the immediate residential premises such as driveways, sidewalks,
14 swimming pools, terraces, patios, fences, porches, garages, and basements.

15 (i) “Remodel” means to alter or reconstruct a dwelling. “Remodel” does not
16 include maintenance or repair work.

17 (j) “Serve” or “service” means personal service or delivery by certified mail,
18 return receipt requested, to the last-known address of the addressee.

19 (k) “Supplier” means a person that manufactures or provides windows or doors
20 for a dwelling.

21 (L) “Working day” means any day except Saturday, Sunday, and holidays
22 designated in s. 230.35 (4) (a).

23 **(2) NOTICE AND OPPORTUNITY TO REPAIR.** (a) Before commencing an action
24 against a contractor or supplier regarding a construction defect, a claimant shall do
25 all of the following:

1 1. No later than 90 working days before commencing the action, deliver written
2 notice to the contractor containing a description of the claim in sufficient detail to
3 explain the nature of the alleged defect and a description of the evidence that the
4 claimant knows or possesses, including expert reports, that substantiates the nature
5 and cause of the alleged construction defect.

6 2. Provide the contractor or supplier with the opportunity to repair or to remedy
7 the alleged construction defect.

8 (b) Within 15 working days after the claimant serves notice of claim under par.
9 (a), or within 25 working days if the contractor makes a claim for contribution from
10 a supplier under sub. (7) (a), each contractor that has received the notice of claim
11 shall serve on the claimant any of the following:

12 1. A written offer to repair or remedy the construction defect at no cost to the
13 claimant. The offer shall include a description of any additional construction
14 necessary to remedy the construction defect and a timetable for the completion of the
15 construction.

16 2. A written offer to settle the claim by monetary payment.

17 3. A written offer including a combination of repairs and monetary payment.

18 4. A written statement that the contractor rejects the claim. The contractor
19 shall state in the written response to the claim the reason for rejecting the claim and
20 include a comprehensive description of all evidence the contractor knows or
21 possesses, including expert reports, that substantiates the reason for rejecting the
22 claim. The contractor shall also include in the written response to the claim any
23 settlement offer received from a supplier.

24 5. A proposal for inspection of the dwelling under par. (c).

1 (c) If a proposal for inspection is made under par. (b), the claimant shall, within
2 15 working days of receiving the contractor's proposal, provide the contractor and
3 any supplier on whom a contribution claim has been made and its agents, experts,
4 and consultants reasonable access to the dwelling to inspect the dwelling, document
5 any alleged construction defects, and perform any testing required to evaluate fully
6 the nature, extent, and cause of the claimed construction defects and the nature and
7 extent of any repairs or replacements that may be necessary to remedy them. If
8 destructive testing is required, the contractor shall deliver the claimant and all
9 persons on whom a notice of claim or contribution claim has been served advance
10 notice of the testing at least 5 working days before commencement of the testing and
11 shall, after completion of the testing, return the dwelling to its pre-testing condition
12 within a reasonable time after completion of the testing, at the contractor's expense.
13 If any inspection or testing reveals a condition that requires additional testing to
14 allow the contractor to evaluate fully the nature, cause, and extent of the
15 construction defect, the contractor shall deliver notice to the claimant and all persons
16 on whom a notice of claim or contribution claim has been served of the need for the
17 additional testing and the claimant shall provide reasonable access to the dwelling.
18 If a claim is asserted on behalf of the owners of multiple dwellings, then the
19 contractor shall be entitled to inspect each of the dwellings subject to the claim. The
20 claimant shall either provide a specific day for the inspection upon reasonable notice
21 for an inspection or require the contractor to request in writing a date for the
22 inspection, at least 3 working days before the inspection.

23 (d) Within 10 working days following completion of the inspection and testing
24 under par. (c), the contractor shall serve on the claimant a notice that includes any
25 of the offers or statements under par. (b) 1. to 4.

1 (e) If the claimant rejects a settlement offer made by the contractor, the
2 claimant shall, within 15 working days after receiving the offer, serve written notice
3 of that rejection to the contractor. The notice shall include the reasons for the
4 claimant's rejection of the contractor's offer. If the claimant believes that the
5 settlement offer omits reference to any portion of the claim, or was unreasonable, the
6 claimant's written notice shall include those items that the claimant believes were
7 omitted and set forth the reasons why the claimant believes the settlement offer is
8 unreasonable. The contractor shall deliver the claimant's response to a supplier
9 upon whom a contribution claim has been made.

10 (f) Upon receipt of a claimant's rejection and the reasons for the rejection, the
11 contractor shall, within 5 working days after receiving the rejection, serve the
12 claimant a written supplemental offer to repair or to remedy the construction defect
13 or serve on the claimant written notice that no additional offer will be made.

14 (g) If the claimant rejects the supplemental offer made by the contractor under
15 par. (f) to remedy the construction defect or to settle the claim by monetary payment
16 or a combination of each, the claimant shall serve written notice of the claimant's
17 rejection on the contractor within 15 working days after receipt of the supplemental
18 offer. The notice shall include the reasons for the claimant's rejection of the
19 contractor's supplemental settlement offer. If the claimant believes the contractor's
20 supplemental settlement offer is unreasonable, the claimant shall set forth the
21 reasons why the claimant believes the supplemental settlement offer is
22 unreasonable. If the contractor declines to make a supplemental offer, or if the
23 claimant rejects the supplemental offer, the claimant may bring an action against
24 the contractor for the claim described in the notice of claim without further notice.

1 (h) If a claimant accepts any offer made under this subsection, and the
2 contractor or supplier does not proceed to repair or remedy the construction defect
3 under the terms of the offer or within the agreed upon timetable, the claimant may
4 bring an action against the contractor or supplier for the claim described in the notice
5 of claim without further notice.

6 (i) If a claimant accepts a contractor's offer to repair a construction defect
7 described in a notice of claim, the claimant shall provide the contractor and its
8 agents, experts, and consultants reasonable access to the dwelling to perform and
9 complete the construction by the timetable stated in the settlement offer.

10 (j) If a claimant receives a written statement that the contractor rejects the
11 claim, or if the contractor does not respond to the claimant's notice, the claimant may
12 bring an action against the contractor for the claim described in the notice of claim
13 without further notice.

14 (k) If a claimant commences an action against a supplier and the supplier has
15 not been provided notice of the claim by the contractor and an opportunity to repair
16 or remedy the construction defect described in the claim as provided under to sub.
17 (7), the court or arbitrator shall dismiss without prejudice or stay the action until the
18 claimant serves the supplier with a copy of the notice of claim and provides the
19 supplier an opportunity to repair or remedy the construction defect in the same
20 manner as provided a contractor under this section.

21 **(3) ACTION; DISMISSAL WITHOUT PREJUDICE.** If the claimant commences an action
22 but fails to comply with the requirements of sub. (2) (a) and the contractor or supplier
23 establishes that the claimant was provided the notice and brochure under s. 101.148
24 (2), the circuit court or arbitrator shall dismiss the action without prejudice. If the
25 claimant commences an action but fails to comply with the requirements of sub. (2)

(a) and the contractor or supplier cannot establish that the notice and brochure was delivered to the claimant under s. 101.148 (2), the circuit court or arbitrator shall stay the action and order the parties to comply with the requirements of sub. (2) (a) and s. 101.148 (2). Before commencing an action against a supplier seeking contribution for a claim that a claimant has served on a contractor, the contractor shall serve the supplier with a notice of contribution claim under sub. (7). If the contractor commences an action against a supplier but fails to serve the notice of contribution claim, the circuit court or arbitrator shall stay the action until the contractor has complied with the requirements of this subsection and sub. (7).

(4) WARRANTY TERMS. The claimant and contractor or supplier are bound by any contractor or supplier warranty terms pertaining to products or services supplied for the dwelling.

(5) ADDITIONAL CONSTRUCTION DEFECTS AND NOTICE AND OPPORTUNITY TO REPAIR. A construction defect that is discovered after an initial claim or contribution claim notice has been provided may not be alleged in an action until the claimant or contractor has served the contractor or supplier written notice of the new claim or contribution claim regarding the alleged new construction defect. The contractor or supplier shall have an opportunity to resolve the notice of the new claim or contribution claim in the manner provided in subs. (2) and (7).

(6) ACTION OF CONTRACTOR OR SUPPLIER. In any action initiated by a contractor or supplier in which a claimant raises an affirmative defense or counterclaim alleging a construction defect, the claimant is not required to comply with this section.

(7) CONTRIBUTION. (a) Before commencing an action seeking contribution from a supplier for a claim that a claimant makes against the contractor, the contractor

1 shall serve the supplier with a written notice of the claimant's claim and a
2 contribution claim within 5 working days after the contractor's receipt of the claim,
3 except that a contractor may make a contribution claim later than 5 days after the
4 contractor's receipt of the initial claim if the contractor has not done any of the
5 following:

- 6 1. Taken any action to repair the defect.
- 7 2. Performed destructive testing.
- 8 3. Authorized the claimant to take any action to repair the defect.
- 9 4. Interfered materially with or altered the property that is the subject of the
10 claim.
- 11 5. Materially precluded a supplier's ability to offer to remedy the defect by
12 making repairs.

13 (b) Before commencing an action against a supplier, a contractor shall provide
14 the supplier with the opportunity to respond to the contribution claim and repair the
15 alleged construction defect under this section. The notice of contribution claim shall
16 state that the contractor asserts a construction defect claim. The notice of
17 contribution claim shall describe the contribution claim in sufficient detail to explain
18 the nature of the alleged construction defect and shall offer the opportunity to correct
19 the construction defect. The contractor shall include in the notice of claim a
20 description of the alleged construction defect and include a comprehensive
21 description of all evidence that the contractor knows or possesses, including expert
22 reports, that substantiates the nature and cause of the alleged construction defect.

23 (c) Within 15 working days after a supplier has received notice that a contractor
24 is seeking contribution under par. (a), the supplier shall serve the contractor with
25 any of the following:

1 1. A written offer to remedy fully or partially the construction defect at no cost
2 to the claimant. The offer shall include a description of any additional construction
3 necessary to remedy the construction defect and a timetable for the completion of the
4 construction.

5 2. A written offer to settle the claim by monetary payment.

6 3. A written offer including a combination of repairs and monetary payment.

7 4. A written statement that the supplier rejects the claim. The supplier shall
8 state in the written response to the claim the reason for rejecting the claim and
9 include a comprehensive description of all evidence the supplier knows or possesses,
10 including expert reports, that substantiates the reason for rejecting the claim.

11 5. A proposal for the inspection of the dwelling, following the procedures under
12 par. (e).

13 (d) The contractor shall forward the supplier's response to the claimant. The
14 supplier and contractor shall use their best efforts to coordinate their responses to
15 claims and contribution claims.

16 (e) If a supplier proposes to inspect the dwelling that is the subject of the
17 contribution claim, the contractor and claimant shall, within 15 working days after
18 receiving the supplier's proposal, provide the supplier and its agents, experts, and
19 consultants reasonable access to the dwelling to inspect the dwelling, document any
20 alleged construction defects, and perform any testing required to evaluate fully the
21 nature, extent, and cause of the claimed construction defects and the nature and
22 extent of any repairs or replacements that may be necessary to remedy them. If
23 destructive testing is required, the supplier shall give the contractor and claimant
24 and all persons on whom a notice of claim or contribution claim has been served
25 advance notice of the testing at least 5 working days before commencement of the

1 testing and shall, after completion of the testing, return the dwelling to its
2 pre-testing condition within a reasonable time after completion of the testing, at the
3 supplier's expense. If any inspection or testing reveals a condition that requires
4 additional testing to allow the supplier to evaluate fully the nature, cause, and extent
5 of the construction defect, the supplier shall provide notice to the contractor and
6 claimant and all persons on whom a notice of claim or contribution claim has been
7 served of the need for the additional testing and the contractor and claimant shall
8 provide reasonable access to the dwelling. If a claim is asserted on behalf of the
9 contractor of multiple dwellings, then the supplier shall be entitled to inspect each
10 of the dwellings. The contractor and claimant shall provide a specific day for the
11 inspection upon reasonable notice for an inspection or require the supplier to request
12 in writing a date for the inspection, at least 3 working days before the inspection.

13 (f) Within 10 working days following completion of the inspection and testing
14 under par. (e), the supplier shall serve on the contractor a notice that includes any
15 of the offers or statements under par. (c) 1. to 4.

16 (g) If the contractor rejects a settlement offer made by the supplier, the
17 contractor shall, within 15 working days after receiving the offer, send written notice
18 of that rejection to the supplier. The notice shall include the reasons for the
19 contractor's rejection of the supplier's offer. If the contractor believes that the
20 settlement offer omits reference to any portion of the claim, or was unreasonable, the
21 contractor's written notice shall include those items that the contractor believes were
22 omitted and set forth the reasons why the contractor believes the settlement offer is
23 unreasonable.

24 (h) Upon receipt of a contractor's rejection and the reasons for the rejection, the
25 supplier shall, within 5 working days of receiving the rejection, make a supplemental

1 offer of repair or monetary payment to the contractor or serve on the contractor
2 written notice that no additional offer will be made.

3 (i) If the contractor rejects the supplemental offer made by the supplier to
4 remedy the construction defect or to settle the claim by monetary payment or a
5 combination of each, the contractor shall, within 15 working days after receiving the
6 offer, serve written notice of the contractor's rejection on the supplier. The notice
7 shall include the reasons for the contractor's rejection of the supplier's supplemental
8 settlement offer. If the contractor believes the supplier's supplemental settlement
9 offer is unreasonable, the contractor shall set forth the reasons why the contractor
10 believes the supplemental settlement offer is unreasonable. If supplier declines to
11 make a supplemental offer, or if the contractor rejects the supplemental offer, the
12 contractor may bring an action against the supplier for the claim described in the
13 notice of claim without further notice.

14 (j) If a contractor accepts any offer made under this subsection, and the supplier
15 does not proceed to make the monetary payment or remedy the construction defect
16 within the agreed upon timetable, the contractor may bring an action against the
17 supplier for the claim described in the notice of claim without further notice. The
18 contractor may also file the supplier's offer and contractor's acceptance in the circuit
19 court action, and the offer and acceptance create a rebuttable presumption that a
20 binding and valid settlement agreement has been created and should be enforced by
21 the court.

22 (k) If a contractor accepts a supplier's offer to repair a construction defect
23 described in a notice of claim, the contractor, when appropriate, and the claimant
24 shall provide the supplier and its agents, experts, and consultants reasonable access

1 to the dwelling to perform and complete the construction by the timetable stated in
2 the settlement offer.

3 (L) If a contractor receives a written statement that the supplier rejects the
4 claim, or if the supplier does not respond to the contractor's notice, the contractor
5 may bring an action against the supplier for the claim described in the notice of claim
6 without further notice.

7 (m) A contractor who is seeking contribution from a supplier and who elects to
8 inspect a dwelling under sub. (2) (b) shall serve the supplier written notice of the
9 inspection date and dwelling address, and whether destructive testing is
10 contemplated, at least 5 working days before the inspection.

11 **(8) FAILURE TO RESPOND TO NOTICE.** If a person fails to timely respond to any
12 notice served in a manner required under this section, then any offer made in that
13 notice is rejected.

14 **(9) LIMITATION PERIOD.** If, during the pendency of the notice, inspection, offer,
15 acceptance, or repair process, an applicable limitation period would otherwise
16 expire, the limitation period is tolled pending completion of the notice of claim
17 process described in this section. This subsection shall not be construed to revive a
18 limitation period that has expired before the date on which a claimant's written
19 notice of claim is served or extend any applicable statute of repose.

20 **(10) ALTERATION OF PROCEDURE.** After service of the initial notice of claim and
21 initial contribution claim, a claimant, a contractor, and a supplier may, by written
22 mutual agreement, alter the procedure for the notice of claim process described in
23 this section.

(11) APPLICATION TO OTHERS. This section does not apply to a contractor's or supplier's right to seek contribution, indemnity, or recovery against any party other than a supplier for a claim made against a contractor or supplier.

(12) HOMEOWNER REPAIRS. Without giving notice under this section, a homeowner may make immediate repairs to a dwelling to protect the health or safety of its occupants.

(13) BROCHURE. The department of commerce shall prepare a brochure explaining the process under this section and shall provide that brochure to contractors.

SECTION 3. Initial applicability.

(1) This act first applies to actions commenced on the effective date of this subsection.

SECTION 4. Effective date.

(1) This act takes effect on the first day of the 6th month beginning after publication.

(END)